(1) Supreme Court, U.S.
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THE CLERK

In the

Supreme Court of the United States

In the Matter of the Marriage of:

Barbara A. Richter,

Respondent,

v.

Kevin J. Richter,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is marriage a contract within the meaning of the prohibition of laws impairing the obligation of contracts in Article I, Section 10 of the United States Constitution, as suggested by Chief Justice John Marshall in *Dartmouth College v. Woodward*, 4 Wheaton 518 at 629 (U. S. 1819)? Or is the correct view that marriage is not a contract within the meaning of such prohibition, as suggested by Justice Stephen Field in *Maynard v. Hill*, 125 U. S. 190 at 210 (1888)?

If marriage is a contract within the meaning of such constitutional prohibition of laws impairing the obligation of contracts, must a state law allowing divorce or dissolution of marriage for irretrievable breakdown in the marriage relationship [in this case Section 518.10(g) and related provisions in Minnesota Statutes] be construed strictly, thus limiting divorce or dissolution of marriage to real, uncontrived, and objective impossiblity, the same as is required in the general jurisprudence of the United States for avoidance of any other contract on account of impossibility?

And, if a marriage is a contract within the meaning of such constitutional prohibition of laws impairing the obligation of contracts, does an individual contesting a suit for divorce or dissolution of his or her marriage on statutory grounds of irretrievable breakdown of the marriage relationship, have a right, under the guarantee of due process of laws in Amendment XIV of the United States Constitution, to a hearing with the assistance of counsel on whether such grounds actually exist?

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Comes now your petitioner, and he shows this honorable Court the following particulars in support of his petition for writ of certiorari to the Minnesota Court of Appeals, to wit:

JURISDICTION

Your petitioner seeks reversal of a judgment of the Minnesota Court of Appeals taking the shape of an opinion filed on May 1, 2001, and reported in 625 N.W.2d 490, the same reproduced in Appendix B hereof. A petition for discretionary review by the Minnesota Supreme Court was sought, and the petition was denied on July 24, 2001, by order whereof a copy has been reproduced in Appendix A hereof.

Jurisdiction to review this cause on writ of certiorari is premised on 28 United States Code, Section 1257, insofar as it permits this Court to review the final judgment of the highest court of a State in which a decision could be had, where a title, right, privilege, or immunity is specially set up or claimed under the United States Constitution, in this case the prohibition of laws impairing the obligation of contracts in Article I, Section 10, and the guarantee of due process of law in Amendment XIV.

Jurisdiction to review this cause on writ of certiorari is also premised on Rule 13 of the Rules of the United States Supreme Court, insofar as it permits such review within 90 days of the order of the court of last resort in the State denying discretionary review of the final judgment of the highest court of the State in which the decision could be had, in this case the order of the Minnesota Supreme Court, filed July 24, 2001, denying discretionary review of the final judgment of the Minnesota Court of Appeals, filed on May 1, 2001.

CONSTITUTIONAL PROVISIONS

Two provisions of the United States Constitution are here involved, to wit: -- Article I, Section 10, insofar as it provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." And Amendment XIV, Section 1, insofar as it provides, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." The latter provision is raised for purposes of this petition, and then as a matter of course, only if your petitioner is right in what he maintains with respect to the former provision.

STATEMENT OF THE CASE

While the full record of this case involves many interesting details, and the particulars may receive more focused attention later, the basic facts, the procedural posture of the case, and an ample discussion of the applicable law as it is thought to prevail in the State of Minnesota, have been stated in the carefully crafted opinion of Judge Gordon Shumaker in behalf of the Minnesota Court of Appeals, filed May 1, 2001 and set forth in Appendix B hereof. Your petitioner disagrees with Judge Shumaker's legal reasoning and conclusions, but stipulates that the facts and record are stated with sufficient accuracy in Judge Shumaker's opinion to suit the purposes of his prayer for writ of certiorari.

Your petitioner was sued in Norman County, Minnesota, by his wife represented by counsel. She sought a divorce -- now called "dissolution of marriage" in Minnesota -- on the claim of "irretrievable breakdown of the marriage relationship" as allowed by Section 518.10(g) and related provisions in Minnesota Statutes. Your petitioner denied grounds for dissolution, and contested proceedings against him on that basis among others.

The trial judge set the "final hearing" of all issues on May 8, 2000. Your petitioner did not at the time have counsel, and so prepared a motion pro se, noticed for hearing on May 8, 2000, seeking dismissal of the suit on the basis that marriage is a contract, and that no grounds existed to rescind or avoid such contract. Your petitioner maintained on good authority, including Section 517.01 of Minnesota Statutes, that marriage is a civil contract between a man and a woman. He also cited the prohibition of laws impairing the obligation of contracts as set forth in Article I, Section 11 of the Minnesota Constitution, and in Article I, Section 10 of the United States Constitution.

The trial judge dismissed your petitioner's motion sua sponte by order of April 26, 2001. From the face of the order, it is evident that the trial judge was annoyed by the defense of your petitioner, based on the view that marriage is a contract. In the said order of April 26, 2001, the trial judge stated that "the hearing scheduled for May 8, 2000, is canceled." Your petitioner read the order as canceling the hearing on May 8, 2001 for all purposes, since the order did not specify a limitation of purpose. He was then informed on May 5, 2001, that the trial judge meant to cancel only the hearing on his motion based on the contract theory of marriage, but the hearing would still be held for all other issues. On the same day, a member of the Minnesota Bar notified the trial judge that he had been contacted by your petitioner, that he thought your petitioner's view of marriage as a contract was sound, and that he would represent your petitioner if a continuance of 60 days were allowed to prepare for trial.

On May 8, 2000, your petitioner appeared before the trial judge and asked for a continuance so he might engage counsel. The trial judge denied the request. Your petitioner left the courtroom. The dissolution was granted. Your petitioner made post-trial motions which were denied, and your petitioner appealed, this time with the assistance of counsel.

The Minnesota Court of Appeals affirmed on May 1, 2001, as appears in Appendix B hereof. It is clear from Judge Shumaker's opinion that the Minnesota Court of Appeals thought your petitioner had properly raised the prohibition of laws impairing the obligation of contracts in Article I, Section 10 of the United States Constitution in defense of his interests. The defense raised was not that the statute allowing dissolution of marriage on grounds of irretrievable breakdown is unconstitutional on its face. The defense was that the statute should be strictly construed in conformity with constitutional principle, that the statute was unconstitutionally applied in the particular circumstances of this case, and that he was at least entitled to a hearing on the merits. The appellate court overruled his defense squarely on grounds that marriage is not a contract within the meaning of the prohibition of laws impairing the obligation of contracts in Article I, Section 10 of the United States Constitution. Plainly enough, if the Minnesota Court of Appeals had held that marriage is a contract within the meaning of the contract clause of Article I, Section 10 of the United States Constitution, it would have reversed and remanded for a hearing on whether grounds existed for dissolution of his marriage.

Your petitioner sought discretionary intervention by the Minnesota Supreme Court, which denied further review on July 24, 2001, as appears in Appendix A hereof.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case raises a question of profound importance in the practice of matrimonial law throughout the United States. The experience in Minnesota is typical of the experience in most other States, and so the nature of the main question, which your petitioner asks this Court to address, will be explained in reference to the legal history of your petitioner's State.

Minnesota, like almost every other State in the Union, received the common law of England, as appears in *State v. Pulle*, 12 Minn. 164 at 170-171 (1866). And part of the common law as received was described by Sir William Blackstone, who wrote of "marriage, which includes the reciprocal rights and duties of husband and wife." He continued, "Our law considers marriage in no other light than as a civil contract," then added, "And, taking [marriage] in this civil light, the law treats it as it does all other contracts, allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract in the proper forms and solemnities required by law." -- *Commentaries on the Laws of England*, Christian Ed., Bk. I, p. 433.

And lest any doubt be entertained on whether these principles of the common law have been received in Minnesota, it was declared in Revised Laws of Minnesota 1905, Section 3552, and now provides in Section 517.0l of Minnesota Statutes that "marriage, so far as its validity is concerned, is a civil contract between a man and a woman., to which consent of the parties, capable of contracting, is essential." See also *Baker v. Nelson*, 191 N. W. 2d 186 (Minn. 1971), in which it was held that, in light of legal tradition and other considerations, it is not unconstitutional to define marriage as a union between a man and a woman; and *Desnoyer v. Jordan*, 7 N. W. 140 (Minn. 1880), in which it was held that an antenuptual agreement is a contract, the obligations of which may not constitutionally be impaired by law.

It appears in Revised Laws of Minnesota 1905, Section 3574, and the amendments thereof, that grounds for divorce in your petitioner's State have traditionally been limited to adultery, cruel and inhuman treatment, impotency, and such like. Statutes of this kind prevailed throughout the Union

over a greater part of the 20th century. Divorce was said to be based on "fault."

When in *Dartmouth College v. Woodward*, 4 Wheaton 518 (U. S. 1819), Chief Justice John Marshal labored to establish that the charter of a corporation granted by King George III was a contract within the meaning of the contract clause in Article I, Section 10 of the United States Constitution, he was confronted with the argument that such a broad notion of contract would lead to the conclusion that marriage is no less a contract, and thus protected by the constitutional prohibition of laws interfering with the obligation of contracts. And certainly this argument was founded upon an unassailable premise. For, as Blackstone said, marriage has always been understood as a civil contract between a man and a woman.

If a man and woman marry, the husband has inchoate rights to the estate of his wife, the wife has inchoate rights to the estate of her husband, and the law of a State abolishing those rights after due celebration and consummation would be null and void under the contract clause in Article I, Section 10 of the United States Constitution. Nothing advanced in *Home Bldg. & Loan Ass'n v. Blaidell,* 290 U. S. 398 (1934), could possibly save a law abrogating such mutual rights of husband and wife arising from their marriage contract.

But the more ominous yet erroneous suggestion of the argument made before Chief Justice Marshall was that any and all divorce allowed by law would necessarily be unconstitutional. Chief Justice Marshall answered in words quoted by the Minnesota Court of Appeals:

> "It [i. e., the contract clause in Article I, Section 10 of the United States Constitution] never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. *Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties*

because it has been broken by the other. When a state legislature shall pass an act annulling all marriages, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional." -- *Dartmouth College v. Woodward*, 4 Wheaton at 629 [Emphasis added by the undersigned].

In these words, Chief Justice Marshall did not deny, but affirmed that marriage is after all a contract entitled to constitutional protection. But he conceded that a "marriage contract," like any other contract, may be avoided or set aside for material breach. It is part of the general jurisprudence of Great Britain and the United States that material breach justifies termination of a contract, nor has it ever been supposed that avoidance or rescission of a contract on such grounds impairs the obligation of such contract, contrary to the prohibition in Article I, Section 10 of the United States Constitution. The principle is much older, but the classic case, with which countless judicial decisions concur in every State of the Union, is *Graves v. Legg*, 156 Eng. Rep. 304 (Exch. 1854), in which it was held that a material breach defeating the purpose of the contract may at his or her option discharge the wronged party from further obligation. Cf. *Cut Rate Supermarket v. Kingpin Foods*, 98 N. W. 2d 257 (Minn. 1959). Because the marriage contract has always assumed customary obligations and mutual expectations of fidelity, protection, succor, sexual union, and care of children, a statute allowing divorce on account of adultery, cruel and inhuman treatment, impotency, etc., is really nothing but a law allowing equitable intervention to rescind such contract on account of material breach.

In Chapter 107 of Minnesota Laws of 1974, following a trend which has since become well nigh universal in the United States, the legislature of your petitioner's State

abolished the traditional grounds for divorce, and in lieu thereof substituted one general formula, which is now codified in Sections 518.10(g) and related provisions of Minnesota Statutes. Dissolution of marriage may now be granted whenever it can be shown that there has been an "irretrievable breakdown in the marriage relationship." This innovation was intended to avoid undue acrimony in our family courts, and to make termination of marriage a more dignified and tolerable experience. The reform is often called "no fault" divorce, but it really means that dissolution of marriage is no longer granted on account of material breach of the marriage contract. The question now is not whether Susan was an adultress or Michael was cruel and inhuman, but whether the marriage of Susan and Michael is broken beyond repair or remedy. See, e. g, *Johnson v. Johnson,* 307 N. W. 2d 783 (Nebr. 1981).

Your petitioner finds nothing objectionable in this change, so long as the statutory language is construed in conformity with the venerable rule stated by this Court in *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U. S. 1 at 30 (1937), "that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

Seen in this light, the statutory phrase "irretrievable breakdown of the marriage relationship" must be given a rigorous interpretation so as to mean actual impossibility in continuing the marriage relationship, an impossibility of performance which the party seeking dissolution cannot repair after a serious and honest effort carried as far as reason and prudence will allow, an impossibility real and uncontrived, the kind of impossibility which meets the standards of our general jurisprudence for avoidance of other contracts.

Your petitioner proposes that Section 518.l0(g) and related provisions of Minnesota Statutes, and all similar laws

in other States, demand the kind of impossibility illustrated by such classic cases as *North German Lloyd v. Guaranty Trust Co.*, 224 U. S. 12 (1917), and *Texas Co. v. Hogarth Shipping Co.*, 256 U. S. 619 (1921). Cf. *Power v. Siat,* 70 N. W. 2d 344 (Minn. 1955). If the statutory phrase "irretrievable breakdown of the marriage relationship" means such objective impossibility, and neither divorce on demand nor its practical equivalent, and if such irretrievable breakdown must, therefore, be considered in earnest by a family court upon a proper hearing as elementary due process under the 14th Amendment whenever the issue is contested and a demand for hearing is made in good faith, then the contract clause in Article I, Section 10 of the United States Constitution is not violated. But your petitioner insists that perfunctory and insensitive application of such laws, as occurs all too often in our contemporary divorce mills and as occurred in this case, is prohibited by the contract clause in Article I, Section 10 of the United States Constitution. And the undersigned believes that Chief Justice Marshall would have agreed with this assessment.

Your petitioner, of course, acknowledges the contrary language of Justice Stephen Field in *Maynard v. Hill*, 125 U. S. 190 at 210 (1888). It is precisely because there is a conflict between what Chief Justice Marshall said and what Justice Field said that this Court should get involved here and clarify this important point of fundamental law. It is not easy to raise such a point on a record so that it may be reviewed properly by this Court, and this case offers a rare opportunity for such review. Your petitioner urges this Court not to waste this opportunity to resolve this point of fundamental law in the public interest.

The Minnesota Court of Appeals observed that the remarks of Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheaton at 629, were dicta and so not binding authority with respect to the contract clause in Article I, Section 10 of the United States Constitution. That

observation seems fair enough. See the comments of Chief Justice Marshall on the definition and value of dicta in *Cohens v. Virginia*, 6 Wheaton 264 at 399-400 (1821).

But the Minnesota Court of Appeals was certainly in error in saying that the observations of Justice Field in *Maynard v. Hill,* 125 U. S. at 210, were holding and therefore binding authority with respect to the contract clause of Article I, Section 10 of the United States Constitution.

The case before Justice Field involved an act passed by the legislature of the Oregon Territory which dissolved a marriage, and title to a parcel of land depended on such act. The contract clause of Article I, Section 10 of the United States Constitution was not involved in the case before Justice Field, because that clause is a limitation upon the legislatures of the several States, whereas the Oregon Territory was not a State, but was created by an organic act of Congress under the second clause of Article IV, Section 3 of the United States Constitution. The supreme court of the Oregon Territory evidently interpreted the organic act of Congress as implicitly prohibiting laws impairing the obligation of contracts, even though no such provision was therein actually expressed as in the Northwest Ordinance of 1787, reenacted in 1789 (1 U. S. Statutes at Large at 52). Justice Field said, as the Minnesota Court of Appeals noted,

> "*Assuming* that the prohibition of the Federal Constitution against the impairment of contracts by state legislation applies equally, *as would seem to be* the opinion of the Supreme Court of the Territory, to legislation by territorial Legislatures, we are clear that marriage is not a contract within the meaning of the prohibition." -- *Maynard v. Hill,* 125 U. S. at 210 [Emphasis added by the undersigned].

In this sentence, Justice Field made clear that he was *not* interpreting the contract clause in Article I, Section 10 of the

United States Constitution. Instead, he interpreted a prohibition which, for all he knew, may not even have been part of the organic act of Congress establishing the Oregon Territory. That disposes of the claim that the observation of Justice Field is binding authority on the meaning of the contract clause in Article I, Section 10 of the United States Constitution. His remark was hypothetical and speculative.

And Justice Field was wrong, because he was supposedly "clear that marriage was not a contract within the meaning of the prohibition" from his *misreading* of what Chief Justice Marshall had said in *Dartmouth College v. Woodward,* 4 Wheaton at 629. For Chief Justice Marshall the conceded that marriage *is* a contract within the meaning of the prohibition.

Aside from the Minnesota Court of Appeals, other appellate courts have been misled by the remarks of Justice Field in *Maynard v. Hill*, 125 U. S. at 210. See in particular *Marriage of Walton,* 104 Cal. Rptr. 472 (Cal. App. 1972), and *Marriage of Frank*, 542 P. 2d 845 (Colo. 1975). *Walton* and *Frank* were not very satisfactory cases, because there the question raised was whether statutes allowing dissolution of marriage for irretrievable breakdown were prima facie unconstitutional, which, as your petitioner concedes, was certainly going too far. *Walton* and *Frank* were also unsatisfactory for the additional reason that the court in neither case was aware of the critical observations of Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheaton at 629, and of the undeniable legal tradition, described by Blackstone, which Chief Justice Marshall had acknowledged.

The decision of the Minnesota Court of Appeals in this case, however, is ripe for review because the right question is asked, viz., whether a statute allowing divorce should be *strictly construed* in keeping with the contract clause of Article I, Section 10 of the United States Constitution to permit dissolution of marriage only for reasons sufficient to

permit avoidance or rescission of a contract. And the decision of the Minnesota Court of Appeals in this case is particularly appropriate for review, especially because the conflict between Chief Justice Marshall and Justice Field is plainly noted and addressed. Judge Shumaker wrote an opinion in good professional form, which serves to facilitate review by this Court.

What is now needed in American jurisprudence is a careful look by this Court at the question of whether marriage is or is not a contract within the meaning of the contract clause of Article I, Section 10 of the United States Constitution.

If marriage is such a contract, as your petitioner believes, and if this Court acknowledges it, then the practice of matrimonial law throughout the country will be changed for the better, because then, in States with statutes allowing dissolution of marriage for irretrievable breakdown of the marital relationship, lawyers and clients will be obliged to explore whether repair of marital breakdown is a genuine possibility before commencing predatory litigation. That will strongly tend to prevent "sneak attack" and "race to the courthouse" tactics. It will induce matrimonial lawyers to work in the direction of reconciliation, or at least divorce with dignity, for which they will be entitled to charge fees and earn them to more constructive purpose. It will oblige matrimonial lawyers to jettison destructive practices which have given them a bad name. It will save, by no means all, perhaps not most, but at least many marriages, because it will require estranged spouses to attempt reconciliation as mature adults. That in turn will help keep intact families which otherwise might break up. Our children and our civilization will benefit.

CONCLUSION

WHEREFORE, your petitioner respectfully prays for a writ of certiorari to the Minnesota Court of Appeals.

Dated: September 26, 2001

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C4-00-1656

In Re the Marriage of:

Barbara A. Richter,

Respondent,

vs.

Kevin J. Richter,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Kevin T. Richter for further review be, and the same is, denied.

Dated: July 24, 2001

BY THE COURT:

/s/
Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
C4-00-1656

In Re the Marriage of:

Barbara A. Richter, petitioner,
Respondent,

vs.

Kevin J. Richter,
Appellant.

Filed May 1, 2001
Affirmed
Shumaker, Judge

Norman County District Court
File No. F499187

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Considered and decided by Peterson, Presiding Judge, Shumaker, Judge, and Poritsky, Judge.*

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

Marriage is not a contract for purposes of the Contract Clauses of United States and Minnesota Constitutions.

OPINION

GORDON W. SHUMAKER, Judge.

The district court set a May 8, 2000 "final hearing" to dissolve the marriage of appellant-husband Kevin Richter and respondent-wife Barbara Richter. Husband moved to dismiss the proceeding, alleging, among other things, that marriage was a contract and that the dissolution statutes violated the provisions in the United States and Minnesota Constitutions prohibiting statutes that interfere with the right to contract. Husband's motion stated it would be heard on May 8. The district court dismissed husband's motion, stating the hearing set for May 8 was cancelled. On May 8, after denying husband's request for a continuance, husband withdrew from the courtroom, and the district court took testimony from wife. The district court later dissolved the marriage and denied husband's posttrial motion. Husband appeals. Because the district court correctly rejected husband's challenge to the dissolution and did not abuse its discretion in denying a continuance, we affirm.

FACTS

The parties married in 1983 and wife petitioned to dissolve the marriage in September 1999. Husband opposed wife's attempts to dissolve the marriage. In early April 2000, the district court set a "final hearing" for May 8 and granted the motion of husband's attorney to withdraw. On April 25, husband, pro se, moved to dismiss the proceeding, alleging, among other things, that (a) there was no irretrievable

breakdown of the marriage; (b) marriage is a contract; and (c) the statutes allowing dissolution of a marriage infringed on the constitutional right to contract. Husband's motion stated it would be heard on May 8.

On April 26, the district court, sua sponte, dismissed husband's motion in an order stating that the hearing set for May 8 was cancelled. Two days later, wife's attorney sent husband a letter stating that the May 8 hearing that had been canceled was the hearing on husband's motion, not the hearing for the dissolution. Husband disagreed. On May 3, husband sent a letter to the district court administrator asking for notice of when the case would be rescheduled and asking for a continuance. On Friday May 5, the district court, trying to remove any confusion, stated the dissolution hearing would occur on May 8. Also on May 5, the district court administrator received a fax and a phone call from an attorney stating he was negotiating terms for representing husband but had not yet been retained and that he would need a 60-day continuance of the proceeding.

At the May 8 hearing, husband (still pro se) asked for a continuance, the district court denied the request, husband withdrew from the courtroom, and the district court took testimony from wife. An amended judgment dissolving the parties' marriage was entered an May 26 and husband, after the denial of his posttrial motion, appeals.

ISSUES

1. Does Minnesota's dissolution statute allow "divorce on demand"?

2. Is marriage a contract for purposes of the Contract Clauses of the United States and Minnesota Constitutions?

3. Did the district court abuse its discretion by denying husband's request for continuance?

ANALYSIS

Minnesota allows marriages to be dissolved if there has been an "irretrievable breakdown of the marriage relationship." Minn. Stat. § 518.06, subd. 1 (2000); *see* Minn. Stat. § 518.10(g) (2000) (requiring dissolution petition to allege "irretrievable breakdown of the marriage relationship"). While husband denies challenging the constitutionality of the Minnesota's dissolution statute, he argues that to be constitutional, the statute cannot be construed to allow "divorce on demand" because that would interfere with his right to contract. *See* U.S. Coast. Art. I, § 10 (prohibiting laws "impairing the obligation of contracts"); Minn. Const. Art. I, § 11 (same). To challenge the dissolution of his marriage on these grounds is to functionally argue that the dissolution statute was applied to grant wife a "divorce on demand," thereby unconstitutionally depriving husband of his right to contract. Such an argument assumes that the Minnesota dissolution statutes allow "divorce on demand" and that marriage is a contract. Both assumptions are incorrect.

I.

In Minnesota, if there is a dispute about whether a marriage is irretrievably broken, "the court shall consider all relevant factors" and find whether the marriage is irretrievably broken. Minn. Stat. § 518.13, subd. 2 (2000). "Irretrievable breakdown" occurs when "there is no reasonable prospect of reconciliation." *Id.* To find irretrievable breakdown of a marriage in a case where the existence of such a breakdown is contested,

> [t]he finding [of irretrievable breakdown] must be supported by evidence that (i) the parties have lived separate and apart for a period of not less than 180

> days immediately preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties.

Id. Here, the parties had been separated, but not for 180 days, before wife petitioned to dissolve the marriage. The district court, however, believed wife's testimony about the state of the parties' marriage and found an irretrievable breakdown of the marriage. A party's testimony is a sufficient basis for a finding of irretrievable breakdown of a marriage, *See Hagerty v. Hagerty,* 281 N.W.2d 386, 388 (Minn. 1979) (stating irretrievable breakdown "can also be shown by evidence of only one party's belief that it is the existing state, particularly where the parties have been living apart"); *Hollander v. Hollander,* 359 N.W.2d 55, 56-57 (Minn. App. 1984) (affirming finding of irretrievable breakdown noting that, among other things, it was supported by wife's testimony). A statute that requires proof of "no reasonable prospect of reconciliation" and "serious marital discord adversely affecting the attitude of one or both of the parties" before a marriage can be dissolved does not allow "divorce on demand." Moreover, husband's withdrawal from the courtroom means he neither entered evidence contrary to wife's assertions on this point nor cross-examined her regarding the state of the marriage. Thus, the only evidence regarding the state of the parties' marriage was wife's uncontradicted testimony.

II.

Marriage, "so far as its validity in law is concerned," is a contract. Minn. Stat. § 517.01 (2000). That marriage is a contract for determining its validity does not mean marriage is a contract in the usual sense of that term. The basis for husband's argument that marriage is a contract is *Dartmouth*

College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).[1] There, the parties litigated whether a charter granted to certain college trustees was a contract and, if so, whether it could be altered by laws passed by the state legislature. 17 U.S. (4 Wheat.) 625-27. The Court held that the charter was a contract. 17 U.S. (4 Wheat.) at 627. It then addressed whether that contract was protected by the Contract Clause of the U.S. Constitution. In doing so, the breadth to be given the term "contract" was disputed. One of several arguments against a broad construction of "contract" was:

> That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude would prohibit these laws.

17 U.S. (4 Wheat.) at 627-28. The Court ruled that "the term 'contract' must be understood in a more limited sense." 17 U.S. (4 Wheat.) at 628. In addressing the argument regarding divorce, the Court noted;

> [The contract clause] never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. *When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.*

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[1] Husband's argument focuses on the U.S. Constitution. Therefore, this opinion does as well.

17 U.S. (4 Wheat.) at 629 (emphasis added). The emphasized text is the crux of husband's argument. In a case involving whether a charter for a college is a contract protected by the U.S. Constitution, it is at best dictum. *See State ex rel. Foster v. Naftalin,* 246 Minn. 181, 208, 74 N.W.2d 249, 266 (1956) (stating dicta "generally is considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases."). Additionally, to read the dictum stating that "there will be time enough to inquire" whether a divorce statue is constitutional, as saying that such statutes *are un*constitutional is both to misread the dictum and to read the dictum as containing an advisory opinion. *See Princeton Univ. v. Schmid,* 455 U.S. 100, 102, 102 S. Ct. 867, 869 (1982) (stating courts do not sit "to give advisory opinions about issues as to which there are not adverse parties before [it]"). Thus, *Dartmouth* cannot be read to support the idea that marriage is a contract within the meaning of the U.S. Constitution.

Any doubt about the meaning of *Dartmouth* was eliminated in *Maynard v. Hill,* 125 U.S. 190, 8 S. Ct. 723 (1888). There, a husband moved away from his wife and to the Oregon Territory. Once there, he, without the knowledge or consent of his wife, procured a divorce. Later, he died. In the resulting litigation involving his estate, the validity of the divorce was questioned. The Supreme Court stated:

> The organic act [of the Territory] extends the legislative power of the territory to all rightful subjects of legislation "not inconsistent with the constitution and laws of the United States." The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of

> the supreme court of the territory, to legislation by territorial legislatures, *we are clear that marriage is not a contract within the meaning of the prohibition.* As was said by Chief Justice Marshall in the *Dartmouth College Case,* not by way of judgment but in answer to objections urged to positions taken: "The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."[2]

Maynard, 125 U.S. at 210, 8 S. Ct. at 729 (emphasis added).

Husband argues that *Maynard* is not binding because it misconstrues *Dartmouth* and was wrongly decided. Husband, however, cites no authority allowing this court to ignore, correct, or overrule the United States Supreme Court regarding the meaning of the United States Constitution.

Because husband incorrectly reads the Minnesota dissolution statute to allow "divorce on demand" and because he misreads the Supreme Court's statements on the subject of whether marriage is a contract, we need not address whether Minnesota's dissolution statutes must be construed in a manner different from the way they were applied here.[3]

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[2] That *Maynard* refers to the relevant portion of *Dartmouth* as having been stated "not by way of judgment," shows that *Maynard* recognized *Dartmouth's* discussion of divorce was dictum.

[3] Even if marriage is a contract, appellant failed to introduce any evidence of the terms of his "contract." Therefore, the terms of his "contract" would be those provided by statute. And, the statute provides that a marriage can be dissolved if it is irretrievably broken. Thus, to prevail in this appeal, husband would have to show that the district court's finding of an irretrievable breakdown of the marriage is clearly erroneous. *See* Minn. R. Civ. P. 52.01 (stating findings of fact nor set aside unless clearly erroneous). When reviewing findings of fact, we view the record

III.

Husband challenges the denial of his request for a continuance. Whether to grant a continuance is discretionary with the district court. *Kate v. Kate*, 234 Minn. 402, 410, 48 N.W.2d 551, 557 (1951). The critical question in evaluating a continuance "is whether a denial prejudices the outcome of the trial." *Jones v. Jones*, 402 N.W.2d 146, 150 (Minn. App. 1987). In denying the continuance, the district court stated (a) the request was not timely; (b) husband had adequate time to hire counsel; (c) the April 26 order cancelled the hearing on husband's motion to dismiss, not the "trial"; (d) it was "very obvious" husband believed the dissolution hearing was set for May 8 because he sought a continuance; and (e) husband requested the continuance for delay. On this record, these findings are supported and husband has not shown that the district court abused its discretion in denying his request for a continuance. Indeed, that husband's request was made for the purpose of delay is a determination that husband did not act in good faith, and one to which we must defer. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (whether party acts in good faith is, essentially, credibility question); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (appellate courts defer to district court credibility determinations).

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in the light most favorable to the district court's findings. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). Here, because husband withdrew from the courtroom, wife entered the only evidence on the state of the marriage. Viewing that evidence in the light most favorable to the district court's finding that the parties' marriage was irretrievably broken, the finding is not clearly erroneous.

DECISION

The Minnesota dissolution statues do not allow "divorce on demand," marriage is not a contract for purposes of the Contract Clauses of the United States and Minnesota Constitutions, and husband has not shown that the district court abused its discretion in denying his request for a continuance. Therefore, we affirm the district court.

Affirmed.

/s/Gordon Shumaker
4/20/01

SUPREME COURT, U.S.
FILED
OCT 19
OFFICE OF THE CLERK

No. 01-549

IN THE

Supreme Court of the United States

KEVIN J. RICHTER,

Petitioner,

v.

BARBARA A. RICHTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is marriage a "contract" protected by the Contract Clause of the United States Constitution?

2. If so, must statutes permitting divorce be construed to require proof of a traditional contract defense before a Court can dissolve a marriage?

3. Was Kevin Richter deprived his right to a hearing with the assistance of counsel?

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STATEMENT OF THE CASE

This matter was first scheduled for trial on March 24, 2000 before a Minnesota District Court. Upon the parties' agreement, and with the Court's consent, the parties instead used that date for an informal pretrial conference, devoted to settlement negotiations. Until such date, both Barbara Richter ("Barbara") and Kevin Richter ("Kevin") were represented by counsel.

On March 24, 2000, Kevin became dissatisfied with the efforts of his attorney. He, thus, requested his attorney's discharge. During a brief hearing, Kevin consented to the discharge and advised that "I'm willing to represent myself in this matter . . .".

And so, the first trial date passed.

By Order of April 5, 2000, the District Court gave notice the matter would be tried on May 8, 2000. Kevin made no effort to request a continuance of such final hearing until providing the Court a letter request on May 5, 2000. He made no showing that, until the absolute last moment, he'd used the intervening period to obtain new counsel.

Earlier, on or about April 26, 2000, Kevin filed an untimely "Motion to Dismiss" claiming, among other things, that Minnesota's dissolution statutes ran afoul of the Contract Clause of the United States Constitution. He purported to schedule a hearing on his motion to take place at the time and date of trial. The same day Kevin filed his motion, the District Court dismissed it, sua sponte, as "without merit".

On the morning of trial, Kevin appeared, pro se, again requesting a continuance. His request was denied. The Court noted: (1) Kevin consented to the withdrawal of his attorney; (2) Kevin's request for continuance was not timely made; and (3) Kevin's request was made, not in good faith, but for purpose of delay. Whereupon, Kevin chose to participate no further and left the Courthouse. The trial took place without him.

During the trial, Barbara testified that her marriage was irretrievably broken, beyond repair or salvation. To explain, she testified that her marriage was loveless and without intimacy. She and Kevin had longstanding disagreements on morals and values. They had been physically separated for over six months. Kevin was controlling and she was unhappy. Having been re-exposed to the outside world by taking employment, Barbara decided "this isn't the way life is suppose to be". Her life with Kevin had been one of slights, subjugation, and submission. During the marriage, Kevin had been physically abusive to her on two occasions and, on other occasions, would "tense up and turn red". Barbara suggested marital counseling to Kevin, "but he said he was happy the way things were, that he would not change, that everything was my problem." Individual counseling motivated Barbara to ask Kevin whether he loved her. He declined to answer.

Most poignantly, Barbara added that her desire to dissolve the marriage was also motivated by a desire to spare her children, as much as possible, the same control and negativism she had long experienced at Kevin's hands. Kevin never recognized an opportunity to praise and encourage the children, or missed a chance to criticize and second guess them. Tragically, tellingly, the children, too, distanced themselves from Kevin.

Lastly, Barbara explained that she and Kevin experienced differences in their faith lives. She is Lutheran. Kevin was a work in progress, evolving from Catholic to Lutheran, from Lutheran to amorphous fundamentalism. Barbara cast no aspersion on Kevin's belief system, but merely described it as different from her own.

The Court issued its Findings of Fact, Conclusions of Law and Judgment on May 22, 2000. On May 26, 2000, it entered Amended Findings of Fact, Conclusions of Law and Judgment, to correct a clerical mistake. Kevin timely appealed to the Minnesota Court of Appeals, asserting his "Contract Clause" argument. His argument was rejected and the judgment affirmed. Kevin then unsuccessfully petitioned for discretionary review by the Minnesota Supreme Court.

REASONS FOR DENYING THE WRIT

I.

MARRIAGE IS NOT A CONTRACT PROTECTED BY THE CONTRACT CLAUSE

Kevin's argument is premised upon his assertion that marriage is a contract *for all purposes*. Kevin's assertion has never been adopted by any Court in this land. To the contrary, it has been rejected time and again, once by the United States Supreme Court.

It is a longstanding legal bromide that "marriage is a contract". However, case upon case makes clear that it is a contract only *in the formation*. In Minnesota, this principal is codified:

> Marriage, *so far as its validity is concerned*, is a civil contract between a man and a woman, to

> which the consent of the parties, capable of contracting, is essential.

M.S., § 517.01 (emphasis supplied).

Down the corridors of time, whenever a litigant has claimed marriage to be a contract for all purposes, the involved Court has disagreed, explaining that the only real similarity between the two is that some minimum capacity is required to enter each relationship.

For example, in 1846, by an Act of the Maine Legislature, Franklin Adams, was divorced from his wife, Mary, and later took a new wife. Mary contested the validity of Franklin's second marriage and, by extension, the validity of the legislative divorce. Mary argued that "marriage is a contract like other contracts, that its obligations cannot be impaired without violating the clause in the constitution of the United States prohibiting the passage of any law impairing the obligation of contracts." *Adams v. Palmer, et al.*, 51 Me. 480 (Maine 1863). The Supreme Court of Maine roundly, and at length, rejected Mary's position:

> . . . it will be found that there are grave and important differences between marriage and other contracts.
>
> The contract **to marry** is like other contracts and subject to the same law. It is a contract to enter into a given relation — a peculiar **status**. But, when once the contract **to marry** has been performed, the original contract, antecedent to such marriage, is at an end. The parties, having complied with its terms, they cease to have rights

> under or by virtue of it. A new relation has been entered into, and the mere assent of the parties to enter into such relation does not thereby make such relation a contract.
>
> When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not contract. It was of contract that the relation should be established, but, being established, the power of the parties, as to their extent or duration, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life; and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, as long as it continues, are such as the law determines from time to time, and none other.

Adams, *id.*, at 482-483.

The *Adams* Court, thus, concluded that divorces were not invalid as impairing the obligation of contracts. *Adams*, *id.*, at 486.

In *Wade v. Kalbfleisch*, 58 N.Y. 282 (New York 1874), the question at hand was whether the breach of a promise to marry could be asserted against the executor of one of the parties. The New York Code then maintained that "all other actions upon

contract" could be maintained against executors. The question thus framed — is marriage a contract? — was resolved decisively, in the negative, by the New York Court of Appeals:

> The general statute, "that marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent of the parties, capable in law of contracting, shall be essential", is not decisive of the question. (citation omitted). This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes and distinguishing features it does not interfere with, or attempt to define . . . The relation is always regulated by government. It is more than a contract . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy . . . It has been held not to be a contract within the provision of the United States Constitution, prohibiting States from passing laws impairing the obligations of contract. (5 Barb., 480; 6 Conn., 540; 7 Dana, 181; 4 R.I. 87.) . . . The marriage relation is essentially personal. Neither the rights, duties or obligations flowing from it can be transferred, and the action scarcely resembles in its main features, an action upon contract. In short, **no court would be justified in holding that it is an action upon contract**, within the meaning of the statute referred to.

Wade, *id.*, at 284-285 (emphasis supplied).

Kevin, in this case, makes much of the United States Supreme Court case of *Dartmouth College v. Woodward*, 4 Wheaton 518 (U.S. 1819). That case directly provides that the Contract Clause of the United States Constitution "has never been understood to restrict the general right of the legislature to legislate on the subject of divorces". Nevertheless, Kevin asserts that, by implication or suggestion, the true holding of *Dartmouth College* is directly contrary to its express language. As the Minnesota Court of Appeals noted, Kevin's position is founded upon his errant interpretation of the following sentence:

> When a state legislature shall pass an act annulling all marriages, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

Dartmouth College v. Woodward, 4 Wheaton at 629.

Kevin evidences his continued misconception by claiming here that, by the foregoing words, "Chief Justice Marshall did not deny, but affirmed that marriage is after all a contract entitled to constitutional protection". In this respect, as the Minnesota Court of Appeals correctly noted, Kevin "misreads the Supreme Court's statements on the subject of whether marriage is a contract."

To the extent there is any confusion regarding the opinion of the United States Supreme Court on the question at hand, such confusion was resolved in *Maynard v. Hill*, 125 U.S. 190 (1888). David and Lydia Maynard were married in 1828. In 1850, David left for the riches of California, leaving Lydia behind. He eventually landed in Oregon Territory, later

reconstituted as Washington Territory. In 1852, without notice of any kind to Lydia, David obtained a divorce from her by act of the Territorial legislature. Years later, the validity of that divorce was central to a property dispute.

Justice Field began the Court's opinion in *Maynard* by affirming, conclusively, that legislatures are empowered to act upon matters of divorce, except to the extent their powers are constitutionally limited:

> When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament and treated the subject as one within their province. And, until a recent period, legislative divorces have been granted, with few exceptions, in all the states. Says Bishop, in his Treatise on Marriage and Divorce: "The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, **except where an invalidity is directly or indirectly created by a written constitution binding the legislative power**.

Maynard, *id.*, at 206 (emphasis supplied).

And, thus, the question became this: Was the Washington Territorial legislature's authority to grant Maynard's divorce

limited by any applicable constitutional provision? Justice Field then framed the issue which makes *Maynard* germane to this case. He said the legislature's authority was "undoubted, unless the marriage was a contract within the prohibitions of the federal constitution against its impairment by legislature" . . . and that "[t]he only inconsistency suggested is that it [the Maynard divorce] impairs the obligation of the contract of marriage." *Maynard*, *id.*, at 210.

With the question so framed, Justice Field stood firmly upon Chief Justice Marshall's conclusion in *Dartmouth College* that the Contract Clause "has never been understood to restrict the general right of the legislature to legislate on the subject of divorces". He then stated, "we are clear that marriage is not a contract within the meaning of the prohibition". *Maynard*, *id.*, at 210. By way of further explanation, Justice Field larded the Court's decision with lengthy quotations, approvingly including those set forth above from the *Adams* and *Wade* cases.

And so, the United States Supreme Court made itself quite clear: Marriage is not a contract like any other. Nor is a legislature's power to regulate it restricted in any respect by the Contract Clause of the United States Constitution.

In more recent times, one Maurice Franks — an attorney — also [unsuccessfully] argued that Colorado's no-fault divorce scheme constituted an impairment of the obligation of all marriage contracts. *In re Marriage of Franks*, 542 P.2d 845.[1] In response, the *Franks* Court held:

1. Perhaps detracting from his credibility, Mr. Franks also argued that by requiring him to work to pay his wife's attorney's fees, the trial court had acted contrary to constitutional prohibitions against slavery.

> It has been stated on numerous occasions that a marriage is a contract between the parties. While this may be so, it is undeniably distinguishable from the ordinary civil contract. The institution of marriage has always been peculiarly a creature of the state, and subject to regulation by its legislature. In this aspect, marriage is the subject of a more immediate interest to the state than is the ordinary contract. These differences have resulted in the determination that marriage is not a "contract" within the meaning of the contract clause of the constitution. *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d. 698; *Maynard v. Hill*, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 651; *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973); *In re marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472; *Adams v. Palmer*, 51 Me. 480.

Franks, *id.*, at 850.[2]

In short, decade after decade, century after century, Court after Court has roundly rejected the argument Kevin puts forth here. The law is clear. Marriage is **not** a contract like any other. Legislatures are empowered to regulate the institution and are not constrained by state or federal constitutional Contract Clause. A litigant who factually meets a statutory standard to obtain a divorce is entitled to it.

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2. A string of similar cases holds that "equitable distribution" divorce statutes do not offend constitutional Contract Clauses. *McCree v. McCree*, 464 A.2d 922 (D.C. App. 1983); *Valladres v. Valladres*, 80 A.D.2d 244 (N.Y. 1981); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (N.J. 1974).

II.

"IRRETRIEVABLE BREAKDOWN" DOES NOT REQUIRE PROOF OF A CONTRACT DEFENSE

Kevin conditionally argues that if, and only if, marriage is a contract protected by the Contract Clause, to maintain its constitutionality the Minnesota's statutory standard for granting dissolutions — i.e., there has been an "irretrievable breakdown" of the marital relation — requires proof of a traditional contract defense. He variously asserts that "irretrievable breakdown" must be interpreted to require proof of "material breach" of the marital contract, "actual impossibility" of performance, or facts justifying "avoidance or rescission of a contract".

The Minnesota Court of Appeals nicely provided three reasons why Kevin's argument fails. First and foremost, of course, it agreed with the foregoing sentiments: Marriage is not a contract protected by the Contract Clause of United States Constitution.

Second, it explained that, even if marriage is a contract, Kevin "failed to introduce any evidence of the terms of his contract." In his Petition here, however, Kevin explains that "the marriage contract has always assumed customary obligations and mutual expectations of fidelity, protection, succor, sexual union, and care of children." By extended reasoning then, he can only be proposing that, before granting divorces, courts devote themselves to a detailed examination of questions such as these: Has party A provided party B contractually sufficient succor? Has each party fulfilled the other's sexual expectations? What evidence is there of unfaithfulness? In other words, Kevin largely urges a return

to the old fault days. For the following reasons, however, those days have been left behind:

1. No-fault grounds, it was hoped, would reduce parties' hostility for one another. The old fault grounds, with their antiquated defenses, were thought to breed costly, bitter, litigation, which impeded the likelihood of reconciliation and wrought destruction extending beyond the parties themselves, but to children and extended families, too. In addition, the old fault grounds left the parties no alternative but to make their most intimate facts — which were often embarrassing or humiliating — matters of public knowledge.

2. No-fault grounds were necessary to protect the integrity of the legal system. To prove fault grounds, parties mutually desiring a divorce would perjure themselves. Sympathetic Judges found "cruelty" in thin air. Attorneys and clients arranged phony out-of-state residences to access more lenient laws. The system winked at lies and, consequently, shared in the deceit.

3. No-fault grounds bridged the gap between the law-as-written and the law-as-applied. The inability of the law to enforce the ancient fault ground goals had become obvious. Courts were granting no-fault divorces, but simply weren't saying so. The law was simply unable to force an unhappy spouse to continue on with a despised partner.

4. No-fault grounds more accurately reflected modern notions of marriage and divorce. Blameworthiness was regarded as less important and, also, more complex than the former belief that, in all instances, one party bore

all fault for the marital demise, the other none. This more modern belief accepted the notion that the state had little interest in unduly preserving as fiction marriages considered, by one or both spouses, irretrievably broken. No Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. Rev. 79

For the foregoing reasons, among others, in 1969, California became the first jurisdiction in America (and the Western World) to adopt a modern, purely "no fault" divorce scheme, when it passed the Family Law Act of 1969. Since then, every State in the Union, save Arkansas, allows some type of "no fault" divorce. No good reason exists to accept Kevin's invitation to jettison the virtually unanimous wisdom of the day.

Third and finally, the Minnesota Court of Appeals dismissed the assumption implicit in Kevin's argument, namely, that Minnesota's statutes allow divorce too easily or, as he characterized, "on demand". Those statutes most definitely do not.

In Minnesota, all grounds for, and defenses to, a divorce action were abolished by statutory amendments in 1974 and 1978. M.S., § 518.06. The sole ground for dissolution of a marriage is an irretrievable breakdown of the marriage relationship. Id. The term "dissolution of marriage" means the same thing as "divorce". M.S., § 518.002.

If one party, as in this case, denies under oath or affirmation that the marriage is irretrievably broken, the Court must consider all relevant factors, including the circumstances giving rise to the action and the prospect of reconciliation, and shall make a finding whether the marriage

is, indeed, irretrievably broken. M.S., § 518.13, subd. 2. A finding of "irretrievable breakdown" is a determination that there is no reasonable prospect of reconciliation. *Id.* The finding must be supported by evidence that:

1. the parties have lived separate and apart for a period of not less than 180 days immediately preceding commencement of the proceeding; or

2. there is serious marital discord adversely affecting the attitude of one or both of the parties toward marriage. Id., emphasis supplied.

The above-described statutory scheme, by its own terms, refutes Kevin's claim that Minnesota's statutes permit cavalier dissolution or sanction "divorce on demand". The State District Court in this case heard ample evidence of "serious marital discord" and made appropriate findings.

III.

KEVIN'S RIGHT TO COUNSEL AND HEARING WAS HONORED

Kevin asserts that he was denied his 14th Amendment right to counsel and hearing. He was not. He had an attorney, but urged, then consented to, that attorney's discharge six weeks before trial. He was given over a month's notice of the trial date. He appeared at the time, date and place of trial, but of his own volition refused to participate. Kevin was not denied the right to counsel or hearing. He simply chose not to avail himself of those rights. He now asks this Court to spare him the consequences of his own free choices.

CONCLUSION

This case possesses none of the features which favor review by the United States Supreme Court. It involves no conflict between Courts of different States or federal Circuits. It involves no unsettled, unresolved issue.

Respondent respectfully prays that this Honorable Court deny the petition.

Respectfully submitted,

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